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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DARRYL MCGHEE,

Defendant and Appellant.

E071574

(Super.Ct.No. 18PA001578)

OPINION

APPEAL from the Superior Court of San Bernardino County. Patrick L.

Christianson, Commissioner. Affirmed as modified with directions.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Robin Urbanski and Yvette M. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Darryl McGhee admitted to removing the global positioning system (GPS) monitoring device in violation of the terms of his parole. (Pen. Code, § 3010.10,

subd. (b).)¹ Defendant was sentenced to 180 days in custody and given credit for 11 days served. Defendant appealed.

On appeal, defendant argues the trial court erred in calculating his custody credits. We modify defendant's presentence custody credits but affirm the order in all other respects.

II. FACTUAL AND PROCEDURAL BACKGROUND²

Defendant admitted that he violated his parole by removing the GPS monitoring device and absconding from parole supervision. Defendant was found and arrested on October 12, 2018.³ A petition for revocation of parole was filed on October 18. On October 22, defendant waived his rights to formal arraignment and admitted the violation.

On October 31, 2018, defendant filed his notice of appeal.

On November 30, 2018, defendant filed a "Motion to Recalculate Presentence Custody Credits." (Some capitalization omitted.) On December 6, the court issued a minute order denying the motion on the basis that the "San Bernardino Sheriff's Department automatically calculates conduct credits and has done so without the court reflecting those on the minute order."

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² The facts are taken from the petition for revocation filed against defendant.

³ Though defendant's counsel stated at the arraignment that defendant was arrested on "November 12th," this must have been a mistake since the arraignment took place on October 22.

III. DISCUSSION

Defendant argues that the trial court miscalculated his custody credits in its minute order because it did not include conduct credits in its calculation and impermissibly delegated calculation of conduct credits to the San Bernardino County Sheriff's Department. We agree. We remand with instructions to prepare an amended minute order reflecting the proper presentence custody credit award, which must include conduct credits. The People agree that the abstract of judgment must be modified to reflect this calculation.⁴

“The failure to properly calculate custody and conduct credit is a jurisdictional error that can be corrected at any time.” (*People v. Chilelli* (2014) 225 Cal.App.4th 581, 591.)⁵ “A defendant is entitled to presentence conduct credits under section 4019 ‘unless it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned’ [citation] or has ‘not satisfactorily complied with the reasonable rules and regulations established by the [local custodial authority].’ ” (*People v. Lara* (2012) 54 Cal.4th 896, 903.) These credits accrue at a rate of two days for every two days of

⁴ Though the People's brief argues that the abstract of judgment in this case must be modified, there is no abstract of judgment in the record. We conclude that the People intended to reference the sentencing minute order.

⁵ Section 1237.1 generally prohibits appeals based solely on an error in the calculation of presentence custody credits unless (1) the defendant first presents the claim in the trial court at the time of sentencing, (2) the defendant makes a motion for correction in the trial court, or (3) calculation of presentence custody credits is not the only issue on appeal. (*People v. Acosta* (1996) 48 Cal.App.4th 411, 427-428; § 1237.1.) Defendant filed a “Motion to Recalculate Presentence Custody Credits” (some capitalization omitted) in the trial court after filing his notice of appeal but before briefing, which the trial court denied. Therefore, this issue is properly before this court.

confinement, rounded down to the nearest even number if the confinement period is an odd number of days. (*People v. Chilelli, supra*, 225 Cal.App.4th at p. 588.)

“ ‘[T]he court imposing a sentence’ has responsibility to calculate the exact number of days the defendant has been in custody ‘prior to sentencing,’ add applicable good behavior credits earned pursuant to section 4019, and reflect the total in the abstract of judgment.” (*People v. Buckhalter* (2001) 26 Cal.4th 20, 30.) “The court awards such credits at the time of sentencing [citation], not as an exercise of discretion, but based on the sheriff’s report of ‘the number of days that [the] defendant has been in custody and for which he or she may be entitled to credit.’ ” (*People v. Lara, supra*, 54 Cal.4th at p. 903.)

The sheriff’s “role with respect to presentence custody credit is to provide the sentencing court with information, records and recommendations,” nothing more. (*People v. Duesler* (1988) 203 Cal.App.3d 273, 276.) Ultimately “[i]t is the duty of the sentencing court to determine ‘the total number of days to be credited ...’ for presentence custody.” (*Ibid.*) It is error for a court to refuse to calculate presentence custody credits and to order the custodial agency to calculate them instead. (*People v. Vargas* (1988) 204 Cal.App.3d 1455, 1469, fn. 9.)

The record reflects, and the parties agree, that defendant spent 11 actual days in custody prior to admitting to the parole violation. The court awarded these 11 days of actual confinement credit in its minute order ordering defendant into custody. However, the court’s minute order does not reflect an award of any conduct credits. Nor does the record contain any evidence that defendant was not entitled to conduct credits, or an

abstract of judgment indicating that these additional credits were awarded. Though the trial court indicated that the sheriff has calculated these credits, this calculation is nowhere in the record. Moreover, it was the duty of the sentencing court to calculate and award presentence custody credits and it may not delegate this duty. (*People v. Duesler*, *supra*, 203 Cal.App.3d at p. 276; *People v. Vargas*, *supra*, 204 Cal.App.3d at p. 1469, fn. 9.)

We agree with the parties that defendant was entitled to 10 days of conduct credits in addition to his 11 days of confinement credit for a total of 21 days. The clerk is directed to prepare an amended minute order reflecting the additional credits.

IV. DISPOSITION

The minute order of the sentencing is modified to reflect 11 days of confinement credit for time actually served plus 10 days of conduct credit pursuant to section 4019 for a total of 21 days of presentence custody credits. The clerk of the Superior Court is directed to prepare an amended minute order reflecting the modification. The order is affirmed in all other respects.

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FIELDS
J.

We concur:

MILLER
Acting P. J.
RAPHAEL
J.